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Nos. 97, 98

In the Supreme Court of the United States

OCTOBER TERM, 1946

JULIUS A. KRUG, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

SANTA FE PACIFIC RAILROAD COMPANY

JULIUS A. KRUG, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

SANTA FE PACIFIC RAILROAD COMPANY

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE PETITIONERS

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OPINIONS BELOW

The opinion of the district court (R. 14–18) is reported at 57 F. Supp. 984. The opinion of the Court of Appeals (R. 37–42) is reported at 153 F. 2d 305.

JURISDICTION

The judgments of the Court of Appeals were entered on February 4, 1946 (R. 43). The petition for writs of certiorari was filed on May 3, 1946, and granted on June 10, 1946 (R. 47). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

A release of "any and all claims of whatever description to lands, interests therein, compensation or reimbursement therefor on account of lands or interests granted, claimed to have been granted, or claimed should have been granted by any act of the Congress * * * in aid of the construction of any portion of its railroad" was given by a railroad company, as required by the Transportation Act of 1940, as a condition precedent to charging the United States full commercial rates for transportation. The questions presented are:

1. Whether, despite such release, the railroad is entitled to select lands under the Acts of 1874 and 1904, which gave the railroad the right to select lands in lieu of lands previously granted for the purpose of aiding construction of the railroad but which had been occupied by settlers after the railroad's rights attached, the railroad having relinquished and reconveyed the occupied lands to the United States as required by the statutes.

2. Whether relief in the nature of mandamus or mandatory injunction may be granted to overturn the view of the Secretary of the Interior that the release barred such claims when there is no finding that this view reflects a misapprehension of the Secretary's plain ministerial duty.

STATUTES INVOLVED

The relevant portions of the Act of July 27, 1866, c. 278, 14 Stat. 292, the Act of June 22, 1874, c. 400, 18 Stat. 194, 43 U. S. C. 888, the Act of April 28, 1904, c. 1810, 33 Stat. 556, the Transportation Act of September 18, 1940, c. 722, 54 Stat. 954, 49 U. S. C. 65, and the Administrative Procedure Act, Public No. 404, 79th Cong., 2d sess., are set out in the Appendix, *infra*, pp. 56–64.

STATEMENT

The judgments sought to be reviewed reversed judgments of the district court dismissing, upon motion, suits brought to enjoin the Secretary of the Interior, the Assistant Secretary of the Interior, and the Commissioner of the General Land Office,[1] from rejecting selections of land filed by respondent on the ground that they are barred by a release under Sec. 321 (b) of the

[1] The petitioner Krug was duly substituted for his predecessor in office against whom the suit was originally brought (R. 43–44). The petitioner Chapman, formerly Assistant Secretary, was similarly substituted in his present capacity of Under Secretary. Journal, U. S. Sup. Ct., Oct. T. 1945,

Transportation Act of 1940, and, by way of mandamus, to compel them to determine respondent's rights in the selections without regard to the release. The facts may be summarized as follows:

By the Act of July 27, 1866, c. 278, 14 Stat. 292, *infra*, pp. 56–57, Congress made a grant of lands in New Mexico and Arizona to the Atlantic and Pacific Railroad Company in aid of the construction of a railroad of that name. The Santa Fe Pacific Railroad Company, hereinafter referred to as the "Railroad", is the successor to the Atlantic and Pacific Railroad Company (R. 1, 19); its rights in the grant were specifically confirmed by the Act of March 3, 1897, c. 374, 29 Stat. 622.

Section 3 of the 1866 Act provided for the basic grants to the Railroad's predecessor and gave it the right to select indemnity lands where lands within the primary limits of the grant were occupied by homestead settlers or otherwise disposed of at the time of the designation of the line of the road. By Section 4 of the Act, title to the lands granted vested *pro tanto* upon the completion of

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p. 271 (Nos. 1192 and 1193). After the writs of certiorari were granted, the General Land Office was abolished, and its functions together with that of the former Grazing Service were transferred to a new agency, the Bureau of Land Management. Section 403 of Reorganization Plan No. 3 of 1946, 11 F. R. 7876. The petitioner Johnson is now Acting Director of this Bureau. 11 F. R. 7776.

twenty-five mile portions of the road. Subsequent to the time when the railroad's rights attached to particular lands under the 1866 Act, some of the lands came into possession of settlers whose entry or filing had been allowed under the homestead or preemption laws. By the Act of June 22, 1874, c. 400, 18 Stat. 194, 43 U. S. C. 888, *infra*, pp. 58–59, Congress provided that the Railroad's predecessor, upon a relinquishment of such lands, should be entitled to select in lieu thereof an equal quantity of other lands within the limits of the grant, "to which they [the Railroad] shall receive title the same as though originally granted." Similarly, the Act of April 28, 1904, c. 1810, 33 Stat. 556, *infra*, p. 59, provided for the relinquishment of any section of the granted lands in the Territory of New Mexico when any portion of the section had been occupied by settlers, and gave to the Railroad the right to select other sections in lieu thereof.[3]

In December 1911, the Railroad relinquished and reconveyed certain lands in New Mexico to the United States under the Act of 1904, and in 1916 lands in Arizona were similarly relinquished and reconveyed under the Act of 1874 (R. 2–3, 20–21). On August 28, 1940, the Railroad filed its application to select land in lieu of that which

[3] The reasons for the passage of the 1904 Act, and its relationship to the 1874 Act, are discussed in detail below, pp. 18–22.

had been relinquished under the 1904 Act (R. 3). A similar application was filed on March 23, 1943, for lands relinquished under the 1874 Act (R. 20–21). On September 18, 1940, the Transportation Act of 1940 became law. Paragraph (a) of Section 321 provides for payment by the United States of the full commercial rates for transportation with exceptions not material here. Paragraph (b) thereof provides, in part, that:

> If any carrier by railroad furnishing such transportation, or any predecessor in interest, shall have received a grant of lands from the United States to aid in the construction of any part of the railroad operated by it, the provisions of law with respect to compensation for such transportation shall continue to apply to such transportation as though subsection (a) of this section had not been enacted until such carrier shall file with the Secretary of the Interior, in the form and manner prescribed by him, a release of any claim it may have against the United States to lands, interests in lands, compensation, or reimbursement on account of lands or interests in lands which have been granted, claimed to have been granted, or which it is claimed should have been granted to such carrier or any such predecessor in interest under any grant to such carrier or such predecessor in interest as aforesaid.

Pursuant to that Act, the Railroad filed a release of "any and all claims of whatever description to

lands, interests therein, compensation or reimbursement therefor on account of lands or interests granted, claimed to have been granted, or claimed should have been granted by any act of the Congress to Santa Fe Pacific Railroad Company or to any predecessor in interest in aid of the construction of any portion of its railroad" (R. 3–4, 6–7, 21).

In May and June of 1943, the Commissioner of the General Land Office rejected the Railroad's applications for selections on the ground that the rights under the 1874 and 1904 Acts had been relinquished by the release filed pursuant to the Transportation Act (R. 4, 21). Appeals were taken, resulting in affirmance by the Assistant Secretary of the Interior of the decision of the General Land Office in three decisions of January 8, 1944 (R. 4, 7–12, 21, 23–28, 28–33). Motions for rehearing were denied (R. 4, 12–14, 21, 33–35).

The Railroad thereupon brought two actions "for injunction and relief in the nature of mandamus" (R. 1, 19) to compel the Secretary of the Interior, the Assistant Secretary of the Interior, and the Commissioner of the General Land Office to determine the Railroad's right to the lands in question without regard to the release filed under the Transportation Act of 1940 (R. 5, 22). The first action, No. 97 in this Court, involves tracts

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No. 8956 in the Court of Appeals; Civil Action 23373 in the District Court.

in New Mexico claimed under the 1904 Act; the other action, No. 98 here,* concerns lands in Arizona sought by virtue of the 1874 Act. The basic question in each case is the same, and both cases were tried and argued together in the courts below.

The defendants moved in each case to dismiss the complaints on the ground that they failed to state causes of action (R. 14, 35). The district court, being of opinion that the three Acts—1866, 1874, and 1904—were "each a part of the same legislative scheme and purpose to grant lands in aid of construction of railroads", held that in consequence the claims under the 1874 and 1904 Acts were within the scope of the release filed under Section 321 (b) of the Transportation Act (R. 14–18). Accordingly, it granted the motion and dismissed the complaints (R. 18, 35).

On appeal, the court below reversed (R. 37–42). Speaking through Mr. Justice Clark, the majority stated that "we perceive substantial reasons for endorsing the point of view advanced by the railroad insofar as it denies that the 1874 and 1904 Acts are to be interpreted as 'grants in aid of construction' ", and that the railroad's view that "the selection rights ~~[in the lands given up]~~ accruing from the subsequent [illegible] are equivalent to the rights in the lands given up and are not, and were not intended to be, affected by

*No. 8957 in the Court of Appeals; Civil Action 2345 in the District Court.

the 1940 Act" "we conceive to be a much sounder approach than that urged by the government." Mr. Chief Justice Groner, dissenting, voted for affirmance, being "of opinion that the applicable section of the Transportation Act of 1940 is broad enough to cover the lands in dispute" (R. 42).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In holding that the release executed by the Railroad in order to take advantage of the concessions of the Transportation Act of 1940 did not embrace its claims to select lands under the Acts of 1874 and 1904.

2. In holding that relief in the nature of mandamus should be granted to compel the Secretary of the Interior and his subordinates, in cases involving public lands of the United States, to reverse their interpretation of statutes relating to such lands, which they are required to administer and interpret, in the absence of a showing that such interpretation is either untenable, unreasonable, or plainly wrong, and where the duty imposed by the statutes is neither plain nor ministerial.

3. In reversing the judgments of the district court.

SUMMARY OF ARGUMENT

The Railroad has taken advantage of the provisions of the Transportation Act of 1940 to exact

full commercial rates from the Government and has filed the release of claims required thereunder. This suit, we believe, is an attempt to avoid that release, which in terms covered claims for compensation on account of lands granted in aid of construction.

I

The Acts of 1866, 1874 and 1904 were all a part of one legislative scheme to make a grant of public lands in aid of construction of the Railroad's line. The original grant of 1866 made provision for indemnity lands where a settler's right had vested before the Railroad's right attached. Where, however, the settler's right was later in time, Congress granted relief under the 1874 Act, by providing for other lands to be granted the Railroad in return for its relinquishing the lands occupied by the settler. The 1904 Act was similarly passed to meet a situation in New Mexico where the Railroad refused to relinquish except by entire sections.

The continuity and integral character of the several Acts are demonstrated by their terms and by the nature of the rights conferred. Under all three statutes, the right to indemnity land was essentially the same. The claims under the 1866 Act are admittedly extinguished by the release. The later Acts implemented and furthered the completion of the grant in aid of construction; the purpose of the Transportation Act of

1940, on the other hand, was to conclude the granting process, and to settle all outstanding claims to land in return for a *quid pro quo*.

The distinctions sought to be made by the court below between the Railroad's claims under the 1866 Act—the original grant—and its claims under the Acts of 1874 and 1904, are untenable; they break down once the claims under the later Acts are analyzed in the light of settled principles of public land law.

Even if the later Acts are held not to be *in pari materia* with the original grant, and not to be considered as grants in aid of construction, they are at the very least grants in substitution for grants in aid of construction, and as such are covered by the release. The claims here were not within any of the exceptions stated in the release which the Railroad executed.

Similarly, the claims are required to be released by the statute in return for the privilege of exacting the higher rates. They do not fall within the exceptions set out in the statute, and neither the terms nor the legislative history of the Transportation Act of 1940 justify excepting the claims here in question from that Act simply because they originated in respect of lands which had once been vested. The ruling below nullifies the statute by permitting the Railroad to have not only the higher rate but the right to receive more lands as well.

II

But regardless of the correctness of the Secretary's view, his decision rejecting the Railroad's claims involved the exercise of judgment and discretion, was reasonable, and has not been shown to be plainly wrong. He was not under a plain, ministerial duty, equivalent to a positive command, to ignore the release in passing on the present claims. That being so, his decision is, under an unbroken line of authorities in this Court, impregnable to mandamus.

The court below did not purport to hold that the Secretary of the Interior was plainly wrong, but simply expressed its own preference for a different construction of the statutes involved. Consequently, on the authority of the cases in this Court—cases not even referred to in the opinion below—the relief sought here, by way of injunction in the nature of mandamus, should not have been granted. In the absence of a determination that the Secretary departed from a plain official duty, and no such determination was even purportedly made, his decision can not be disturbed.

This standard of review is not modified by anything contained in the Administrative Procedure Act. To begin with, its provisions as to judicial review, which became effective over three months after the writs of certiorari were granted herein, are not applicable to pending cases; nothing in

the statute or its legislative history reflects an intent to alter the scope of judicial review where the proceedings in review are already in the ultimate appellate stage.

Moreover, and in any event, both the language and the legislative history of the Administrative Procedure Act show a clear intent to preserve the existing scope of judicial review. The debates are devoid of any suggestion that the rule with reference to the function of mandamus was even under consideration. Strong and apt language would be necessary to overturn a doctrine so firmly settled. The Act evidences no such purpose.

ARGUMENT

The Railroad has taken advantage of the right, accorded it by the Transportation Act of 1940, to exact full commercial rates from the Government,[5] and has filed the release of claims required under that Act. This suit is, we think, an attempt to avoid that release, and the ruling of the court below has approved such avoidance.

[5] Except in respect of "the transportation of military or naval property of the United States moving for military or naval and not for civil use or * * * of members of the military or naval forces of the United States (or of property of such members) when such members are traveling on official duty." Section 321 (a), *infra*, pp. 59–60. For the scope of the first clause of the exception, see *United States* v. *Powell and Anderson, Receivers*, and *United States* v. *Atlantic Coast Line R. Co.*, Nos. 56 and 57, this Term. The entire exception has now been repealed, to take effect on October 1, 1946, by the Act of December 12, 1945, Public No. 256, 79th Cong., 1st sess.

The release here in question (R. 6–7) relinquished

> any and all claims of whatever description to lands, interests therein, compensation or reimbursement therefor on account of lands or interests granted, claimed to have been granted, or claimed should have been granted by any act of the Congress to Santa Fe Pacific Railroad Company or to any predecessor in interest in aid of the construction of any portion of its railroad.

As we shall show, the claims here in question under the Acts of 1874 and 1904 were for lands in aid of construction. But even on respondent's view, that its selection rights under these Acts were not claims to lands granted in aid of construction (Br. Opp. 2, 3, 7), they were indubitably "claims * * * to * * * *compensation or reimbursement therefor on account of lands* * * * granted * * * in aid of the construction of any portion of its railroad," and so were extinguished by the release. It is significant that so much of the language of the release as is italicized in the preceding sentence is pointedly ignored in respondent's argument (Br. Opp. 4–5). Whatever else they may be, the claims here asserted are obviously for compensation on account of lands granted in aid of construction, lands which had been reconveyed to the United States under the Acts of 1874 and 1904. The

Railroad exchanged its right to those claims in return for a right to collect full commercial rates from the Government.

The Transportation Act of 1940 was enacted at a time when the Railroad had unsatisfied claims under its grant amounting to nearly 1,500,000 acres of land (Br. Opp. 3). Under the provisions of Section 321 of the Act, *infra*, pp. 59–61, Congress offered to relinquish its right to continue to exact lower rates from the Railroad for Government traffic (other than military or naval traffic)[6] if the Railroad in turn would agree to relinquish whatever claims it had to additional public land. The Railroad accepted the offer and executed a release well within the time specified by the Act (R. 6–7). Presumably this document would not have been executed if the Railroad had deemed the bargain disadvantageous. But, advantageous or not, it was a bargain, and the Railroad, which has now had the benefit of full commercial rates during a period of extremely heavy rail traffic, cannot now claim the benefit of what it relinquished as well as the benefit of what it obtained. It cannot keep its claim to land while being freed of land-grant rates. It must abide the trade it made.

The basic error of the court below lay in its failure to give proper effect to the words of the release and to the terms and the obvious intent of

[6] See note 5, *supra*.

the Transportation Act of 1940. It was on this ground that Chief Justice Groner based his dissent. But the court also erred in failing to hold that the 1874 and 1904 Acts were simply extensions of the original 1866 grant, designed to assure the Railroad of its full share of lands granted in aid of construction; and in disregarding the unbroken line of authorities in this Court which hold that a decision of the Secretary of the Interior on a matter within his jurisdiction is not subject to reversal by mandamus or mandatory injunction where, as here, it is neither unreasonable nor plainly wrong.

I. Claims to Lands Granted by the Acts of 1874 and 1904 in Lieu of Lands Granted by the 1866 Act and Thereafter Relinquished Were Extinguished by the Release Here Executed Pursuant to the Transportation Act of 1940

A. THE ACTS OF 1866, 1874, AND 1904 WERE ALL A PART OF ONE LEGISLATIVE SCHEME TO MAKE A GRANT OF PUBLIC LANDS IN AID OF THE CONSTRUCTION OF THE RAILROAD'S LINE

In Section 3 of the original grant to the Railroad's predecessor, *infra*, pp. 56–57, provision was made that, whenever any of the sections granted to the company were found to have been occupied by homestead settlers or otherwise disposed of, prior to the time of definite location of the line, other land within specified indemnity limits could be selected. Provision was likewise made for the selection of agricultural land in place of any land

originally granted that was found to be mineral in character. It is not disputed that such claims to lieu or indemnity lands arise out of the provisions of the original grant (R. 38–39).

That is to say, when the settler's right was prior in time to that of the Railroad, the latter was entitled to indemnity lands as part of the grant in aid of construction. But it was often difficult to ascertain just when the Railroad's right attached. While it was settled, as a matter of law, that the critical time was the date of filing and approval of the map of definite location in the General Land Office,[7] the fact of such filing was not only unknown to the settler but also to the local land officers. See *Southern Pacific R. R. Co.*, 18 L. D. 275, 279. It was to relieve the hardships caused by this state of affairs to settlers whose filing or entry had been mistakenly allowed by the Land Department that the 1874 Act was enacted. As this Court pointed out in *Santa Fe Pac. R. R.* v. *Work*, 267 U. S. 511, 516,

> The Act of 1874 was passed to help homestead and other settlers who were in hard case because they had established their settlement after the grant to the Railroad Company was held to have attached. The question when it did attach was for a long time doubtful and the subject of litigation. The Act of 1874 was intended to induce the

[7] *Van Wyck* v. *Knevals*, 106 U. S. 360, 366–367; *Kansas Pacific Ry. Co.* v. *Dunmeyer*, 113 U. S. 629, 634–635.

> railroad companies to relinquish such lands thus illegally occupied as against them by promising in lieu thereof other lands of equal area in both odd and even sections within the prescribed limits.[8]

The 1874 Act applied to land grant railroads generally; the 1904 Act applied only to the Atlantic and Pacific grant in New Mexico, and was passed to protect settlers in two or three small settlements in Valencia County in that State. As to those tracts, the railroad refused to relinquish 160-acre tracts, as required by the 1874 Act, since to do so would have eliminated the best land from the sections in which these tracts were located, thus leaving the Railroad with the poorer land in irregular fractions. But the company indicated that it would relinquish the whole of any section on which one or more settlers were located if legislation were enacted giving it the right to select a whole section in lieu thereof. See H. Rep. 1203, 58th Cong., 2d sess.; 38 Cong. Rec. 2900–2901. The substantial purpose of the 1904 Act, however, was the same as that of the basic 1874 Act.

The 1874 Act, *infra*, pp. 58–59, in terms provided that the transactions contemplated were to

[8] Compare the Act of August 29, 1890, c. 819, 26 Stat. 369, 43 U. S. C. 889, giving land grant railroads the same right of selection where settlers had resided for a period of five years upon the improved land granted to a railroad company, but whose filings or entries were not of record.

be "in the adjustment of all railroad land grants" and that the grantees were entitled to select "an equal quantity of other lands in lieu" of lands obtained under the original grant, which they might relinquish in the interest of settlers at the request of the Secretary of the Interior; to such selected lands the grantees would "receive title the same as though originally granted."

The 1904 Act permitted the relinquishment of whole sections of land, title to which was derived "through the Act of Congress of July twenty-seventh, eighteen hundred and sixty-six, in aid of the construction of such railroad" and entitled the company "to select in lieu thereof" other sections.

The continuity and integral character of the several acts are thus demonstrated by their terms, and, additionally, by the nature of the rights conferred.

The right to make selections pursuant to the Acts of 1874 and 1904 is essentially the same as the right given by Section 3 of the Act of 1866 to select lieu lands to replace losses within the place limits, and to select agricultural lands in lieu of mineral lands excluded from the grant. Such rights of selection under the 1866 Act were contingent upon the existence of losses and were restricted to land within definite limits. Similarly, the right to select under the later acts is contingent upon relinquishment of land previ-

ously granted; and the land subject to selection is restricted, in the case of the 1874 Act, to land within the limits of the original grant, and, in the case of the 1904 Act, to vacant public land within New Mexico. Thus, under all three acts, the right to select is a contingent right, it is to be exercised for the purpose of giving the railroad a full equivalent for the land granted or intended to be granted in aid of construction, and it is confined to designated public land within specified territorial limits.

As the district court well stated (R. 17),

> * * * The subsequent Acts are not independent granting Acts without relation to any other grant, but are clearly dependent upon, and supplemental to, the grant contained in the Act of 1866, supra, and provide for grants contingent upon the relinquishment of lands granted under such Act. In other words, the Acts of 1904 and 1874, supra, are, respectively, granting Acts in aid of construction when coupled, as they must be, with the Act of 1866, supra.

Even the court below recognized that the Acts of 1866, 1874, and 1904 "are by their character related to the same general problem of adjusting railroad land claims" (R. 42).

The Acts of 1874 and 1904 did not increase the aggregate amount of land previously granted, but they conferred the right to acquire land which could not be acquired under the original

grant on the condition that the Railroad relinquish its right to an equal amount of land originally granted. Certainly if the provisions of the 1874 and 1904 Acts had been embodied in the Act of 1866, it could not be contended that the Railroad's present claims are not extinguished by its release. Yet the effect of the 1874 and 1904 Acts is the same as if their provisions had originally been a part of the original granting act. The circumstance that three statutes are involved rather than one, and that as a matter of chronology they are "separate and distinct" pieces of legislation (Br. Opp. 6), is of course irrelevant on the issue of construction. The later acts are simply extensions of the prior right to make lieu selections, for the question of which Act is to apply is one of time, i. e., whether the Railroad's rights vested before or after those of the settlers attached.

The court below held that the transactions contemplated by the 1874 Act "cannot rightly be termed ancillary to or amendatory of the original grant" (R. 41). But this seems clearly wrong, since the only basis for the Railroad's claim under the 1874 Act is the confirmation to it, by the Act of March 3, 1897, c. 374, 29 Stat. 622, of "the same rights, powers, privileges, grants, and franchises" granted by the Act of June 27, 1866, "and by acts amendatory thereof and supplemental thereto." The Railroad has no standing

here at all unless the Act of 1874 be considered as an act amendatory of and supplemental to the original grant in aid of construction. And the 1904 Act, as we have already noted above, p. 19, specifically refers to the 1866 grant to the Atlantic and Pacific Railroad Company as the source of title.

The substitute land is referred to in all three Acts as "lieu" land, and it is evident that the purpose of the two later statutes was to implement and further the completion of the grant in aid of construction first made in 1866.

The process first begun in 1866 came to a close in 1940; the object of the Transportation Act of 1940 was to provide an expeditious method of releasing outstanding claims, and thereby to conclude the granting process. Events occurring just prior to the enactment of the latter statute had demonstrated the complexities of any less summary method of adjusting a railroad land grant.

After the decision of this Court in the *Forest Reserve* case in 1921 (*United States* v. *Northern Pac. Ry. Co.*, 256 U. S. 51) had suggested that there might be a deficiency in the Northern Pacific land grant, there followed studies in the Interior and Agriculture Departments which led eventually to the congressional investigation authorized by the Joint Resolution of June 5, 1924, c. 267, 43 Stat. 431. That investigation in turn resulted in

the Act of June 25, 1929, c. 41, 46 Stat. 41. The suit filed pursuant to the Act last cited produced a litigation which was found too cumbersome for normal appellate processes; a special Act was required to bring the controversy here, Act of May 22, 1936, c. 444, 49 Stat. 1369, and a reargument had been ordered before the passage of the Transportation Act of 1940. See *United States* v. *Northern Pac. Ry. Co.*, 310 U. S. 615.[9] Obviously a more summary method of adjustment was necessary,[10] and, equally obviously, no railroad could be expected to relinquish its claims without a *quid pro quo*. Accordingly, Congress in the 1940 Act offered to permit land grant railroads to charge the United States full commercial rates on non-military traffic, on condition that, while retaining land already patented and selections which the Secretary had approved, they give up all claims

> to lands, interests in lands, compensation, or reimbursement on account of lands or

[9] The case was remanded for further proceedings, *United States* v. *Northern Pac. Ry. Co.*, 311 U. S. 317, with many basic issues reserved because of an equal division of opinion in the Court. 311 U. S. at 341-342. Later the case was settled—20 years after the *Forest Reserve* decision. *United States* v. *Northern Pac. Ry. Co.*, 41 F. Supp. 273 (E. D. Wash.).

[10] The debates on the Transportation Act of 1940 show that Congress was aware that the Northern Pacific land grant was still in process of selection and was being litigated. 84 Cong. Rec. 10115-10116, 10120. And see the hearings on antecedent bills, cited *infra*, p. 36, note 13.

> interests in lands which have been granted, claimed to have been granted, or which it is claimed should have been granted to such carrier [i. e., land grant railroad] or any such predecessor in interest under any grant to such carrier or such predecessor in interest * * *

When the Railroad executed the release here involved, it accepted the offer; that closed the books on the grant in aid of the construction of the Atlantic and Pacific line. Thereafter the Railroad had no further claims either to lands or to compensation on account of lands. The account was settled.

B. THE DISTINCTIONS SOUGHT TO BE MADE BY THE COURT BELOW BETWEEN THE RAILROAD'S CLAIMS UNDER THE 1866 ACT AND THOSE UNDER THE 1874 AND 1904 ACTS ARE UNTENABLE

The court below, in its attempt to distinguish the Railroad's claims under the 1874 and 1904 Acts from the admittedly released claims under Section 3 of the 1866 Act, pointed out that the United States could not have reached the lands relinquished under the later Acts if the Railroad had refused to reconvey them, and that if reconveyances had not been made under those Acts the lands in fact given up by the reconveyance need not have been returned because of the release. "But," said Mr. Justice Clark (R. 41–42),

> the government now contends that the voluntary giving up of the once vested lands under the provisions of the 1874 and 1904 Acts, throws the railroad's claims back unto the same footing as those for "indemnity" lands which had never been selected under the 1866 Act. The dignity of the railroad's rights is thus depreciated by its agreeing to do business with the government at the government's request under the later acts. We cannot agree that such result was in contemplation when the 1874 and 1904 Acts were passed.
>
> In our view the rights acquired through relinquishment of vested interests stand equal in strength to the actual holding of the initial grants. In other words, the selection rights accruing from the subsequent transactions are equivalent to the rights in the lands given up * * *.

But this ignores the settled rule that the right to indemnity lands under Section 3 of the original grant (i.e., lands granted in lieu of unavailable place lands) stands on an equal footing with the right to the place lands themselves. Neither was inferior in "dignity" to the other. Both were on a parity. As this Court said in *Payne v. Central Pac. Ry. Co.*, 255 U. S. 228, 236,

> The ultimate obligation of the Government in respect of the indemnity lands is on the same plane as that respecting the lands in place. The only difference is in the mode of identification. Those in place

> are identified by filing the map of definite location, and the indemnity lands by selections made in lieu of losses in the place limits.

And see *United States* v. *Northern Pac. Ry. Co.*, 311 U. S. 317, 329, quoting the foregoing with approval.

Consequently, a claim (as here) for compensation in respect of place lands once vested and later relinquished can be no different from the right to indemnity lands, which was for compensation for place lands that had never vested. Therefore, to say with the court below that the selection rights under the 1874 and 1904 Acts "are equivalent to the rights in the lands given up," and at the same time to say that it is a depreciation of their dignity to put them "back unto the same footing as those for 'indemnity' lands which had never been selected under the 1866 Act," is to urge that five is the equivalent of five and that its dignity is depreciated by throwing it back on the footing of five.

The line of distinction is, not whether the Railroad had at some time prior to the release acquired title and then reconveyed it or not, nor whether its claim is a claim under the 1866 Act or under the later statutes; the test is whether the Railroad had land or merely a claim to land. If it had the land, its title thereto was not affected by the release. If, on the other hand, it had

merely claims "to land, interests therein, compensation or reimbursement therefor on account of lands or interests granted, claimed to have been granted, or claimed should have been granted by any act of the Congress to Santa Fe Pacific Railroad Company or to any predecessor in interest in aid of the construction of any portion of its railroad" (R. 6), then those claims were extinguished by the release.

It is immaterial that the Railroad's rights had once vested, that it once had the actual lands. When the Railroad reconveyed and relinquished the lands here in question, those in New Mexico in 1911–12 (R. 2–3, 8) and those in Arizona in 1916–17 (R. 20, 24), it exchanged its land for a claim to select other lands. That claim was released in 1940, and the circumstance that it arose out of the relinquishment of rights which had previously vested does not exclude it from the broad terms of the release.

Nor is it material, as the court below seemed to think (R. 41), that the rights conferred by the 1874 and 1904 Acts were contractual in nature. For the same is true as to the basic land grant of 1866. The enactment of a statute granting the odd-numbered sections within a designated distance on either side of a railroad line to be built in the future constitutes an offer which ripens into a contract when the grantee indicates acceptance by filing its map of definite location. *Burke*

v. *Southern Pac. R. R. Co.*, 234 U. S. 669, 680; *United States* v. *Northern Pac. Ry. Co.*, 256 U. S. 51. Legal title to unappropriated lands then vests as of the date of the grant, by relation back. *Northern Lumber Co.* v. *O'Brien*, 204 U. S. 190, 196; *Wisconsin R. R. Co.* v. *Price County*, 133 U. S. 496. The patent subsequently issued is only evidence of title. *Burke* v. *Southern Pac. R. R. Co.*, 234 U. S. 669; *Deseret Salt Co.* v. *Tarpey*, 142 U. S. 241, 252. The 1874 and 1904 Acts are similarly contracts, see *Santa Fe Pacific R. R. Co.* v. *Fall*, 259 U. S. 197, and are equally granting acts, since they establish a means of identifying particular areas of land owned by the United States, and pledge the United States to transfer its title to identified legal persons who shall meet certain conditions. The circumstance that these acts create only contingent rights does not serve to derogate from their status as granting acts. *Payne* v. *Central Pac. Ry. Co.*, 255 U. S. 228, 236; *Payne* v. *New Mexico*, 255 U. S. 367; *West* v. *Ratledge Timber Co.*, 244 U. S. 90.

In short, the attempts of the court below to distinguish the Railroad's rights under the 1874 and 1904 Acts from its claims under the 1866 Act, so as to exclude the former from the release in the face of the concession that the latter cannot be so excluded, break down utterly once the distinctions are tested, as they must be, by the settled principles of the law relating to the public lands.

C. IN ANY EVENT, AND REGARDLESS OF THE STATUS OF THE CLAIMS AS A MATTER OF PUBLIC LAND LAW, THE TERMS OF THE RELEASE AND THE TERMS AND LEGISLATIVE HISTORY OF THE TRANSPORTATION ACT OF 1940 SHOW THAT THESE CLAIMS WERE REQUIRED TO BE EXTINGUISHED IN RETURN FOR THE RAILROAD'S RIGHT TO EXACT FULL COMMERCIAL RATES FROM THE UNITED STATES

It is possible to dispose of the present case on the merits without deciding, as a matter of public land law, whether the Acts of 1874 and 1904 are to be construed *in pari materia* with the original grant of 1866, without ascertaining or defining the precise nature of the rights granted thereby, and without deciding whether and to what extent those rights differ from or are similar to or are identical with other lieu and indemnity rights. For in our view, even if our arguments above, pp. 16–28, should be rejected, the result must still be the same; the Railroad's rights, whatever their nature, were extinguished by its release.

Such a disposition of the present case, i. e., without specifically determining whether the several Acts are *in pari materia*, would follow the precedent of *Santa Fe Pac. R. R.* v. *Work*, 267 U. S. 511. There the Court held that the Railroad could not select coal lands under the 1874 Act for the reason that, since that Act applied generally to all land grant railroads, the term "mineral" therein should be given its usual mean-

ing rather than the more restricted definition used in the original 1866 grant. The decision proceeded on the broad ground that "not mineral" in the 1874 Act could not be construed to include coal in some cases and to exclude it in others, and was rested also on the circumstance that the construction adopted was in accord with the uniform practice in the Land Department for nearly half a century. 267 U. S. at 516–517. The Court in consequence did not find it necessary to consider whether, as urged by the Railroad in that case, the Act of 1874 was *in pari materia* with the original Act of 1866.[11]

Here, likewise, it is not necessary to determine whether the Acts are *in pari materia*, for even if we concede *arguendo* that the grants made by the 1874 and 1904 Acts were not in aid of construction, they were at the very least grants in substi-

[11] See Santa Fe Br., No. 302, Oct. T. 1924, p. 5: "* * * the real question in this case is whether, IN DETERMINING RIGHTS UNDER THE ACT OF JUNE 22, 1874, SAID ACT IS TO BE CONSTRUED AS IN *PARI MATERIA* WITH THE PARTICULAR GRANTING ACT UNDER WHICH RIGHTS ARE RELINQUISHED ON REQUEST OF THE SECRETARY OF THE INTERIOR?" [Capitals in original.] And see also Santa Fe Br. 11–18. The United States in the same case argued (though without resort to capital letters) that the Act of 1874 was not supplemental to the grant. U. S. Br., No. 302, Oct. T. 1924, pp. 9, 19–20. In view of the Court's studied refusal even to consider this issue, it is submitted that the Railroad's reliance on the decision for the proposition that the Acts of 1866 and 1874 are not *in pari materia* (Br. Opp. 6) is not well founded.

tution for grants in aid of construction. Consequently, all such grants which had not been perfected by the issuance of patents to specific land (or by the approval of selection lists, see pp. 32, 33, *infra*) remained in the status of "claims," and so were within the terms of the release.

We draw attention once again to the language of that instrument (R. 6–7), whereby the Railroad

> relinquishes, remises and quitclaims to the United States of America any and all claims of whatever description to lands, interests therein, compensation or reimbursement therefor on account of lands or interests granted, claimed to have been granted, or claimed should have been granted by any act of the Congress to Santa Fe Pacific Railroad Company or to any predecessor in interest in aid of the construction of any portion of its railroad.

We repeat what we consider to be the words plainly applicable here,

> all claims of whatever description to * * * compensation or reimbursement therefor on account of lands * * * granted * * * by any act of the Congress to Santa Fe Pacific Railroad Company or to any predecessor in interest in aid of the construction of any portion of its railroad.

There is nothing in the opinion of the court below which tends in even the slightest degree to

support the notion that this language was not fully adequate to extinguish the Railroad's claims under the Acts of 1874 and 1904. Nothing in that opinion, even assuming it to be otherwise correct, tends in even the slightest degree to suggest that the Railroad's claims were not "claims * * * to * * * compensation * * * on account of lands * * * granted * * * in aid of * * * construction." We repeat what we said above, pp. 15–16, the basic and all-pervading error of the court below lay in its failure to understand that the release covered not only claims to lands granted in aid of construction but also claims to compensation on account of lands granted in aid of construction.

The release contains three exceptions, none applicable here. It excepts (a) land sold to innocent purchasers for value prior to the date of the Transportation Act of 1940, (b) lands embraced in selections approved by the Secretary of the Interior prior to that date, and (c) lands already patented or certified to the Railroad or its predecessors. The present claims obviously fall into none of these categories; what the court below has done, therefore, was to write a new exception into the release. We need not belabor the proposition that it had no power to do so.

And the result is no different when we turn from the release itself to the provisions and legislative history of the statute which authorized its

execution, and pursuant to which it was specifically stated to be executed.[12] Here again the statutory reference is to "lands, interests in lands, compensation or reimbursement on account of lands," and the exceptions relate to the same three categories—patented lands, lands included in approved selection lists, and lands sold to *bona fide* purchasers.

The 1940 Act not only provides for the release of claims to lands "which have been granted, claimed to have been granted, or which it is claimed should have been granted", it also provides for the release of claims to "reimbursement on account of lands" that have been granted. This latter provision clearly covers land that had been granted, had vested and was later divested, either by sale to the Government, or as in the instant cases, by relinquishment, the privilege of selecting comparable land being given by way of reimbursement. Hence, it is immaterial that, at the time of the adoption of the 1874 and 1904 Acts, the construction of the road had been completed. If the applicability of the 1940 Act be restricted to the release of claims under the 1866 Act without

[12] The release, prescribed by the Secretary of the Interior (43 C. F. R. (1943 Cum. Supp.) § 273.64), was obviously intended to have the same scope as the Act itself. If the release should be construed as not relinquishing claims which the Act required to be released (cf. R. 39–40) and respondent insists on such claims, it must of course forego the concessions of the Act and repay everything which it has collected from the United States in excess of the former land-grant rate.

regard to the provisions of the 1874 and 1904 Acts, then the language relating to "reimbursement on account of lands" which had been granted would be mere surplusage.

Claims arising under the 1874 and 1904 Acts are either claims to lands granted in aid of construction (see *supra*, pp. 16-24), or they are claims to reimbursement on account of lands concededly granted under the 1866 Act in aid of construction, and which were relinquished. Considered in either light, they constitute claims which must be released under the Transportation Act of 1940 by a land grant railroad before such a railroad may have the benefit of the higher rates.

The court below laid much emphasis on the fact that the lands relinquished pursuant to the 1874 and 1904 Acts "had for all practical purposes vested in the railroad", and that it "was under no compulsion to release them, and it did so only because of a new promise by the government which guaranteed replacement lands" (R. 41). But the lands had been reconveyed and relinquished to the United States in 1911 and 1916 and this "new promise", guaranteeing replacement lands as reimbursement for the lands surrendered, left the Railroad in the same position it would have been in before any "lieu land" had vested in it. In other words, it had substitute claims to select lands. It was these latter claims

that the statute, by its plain words, required to be surrendered in return for the payment by the United States of full commercial rates. True, the Railroad did not have to forego the claims, any more than it was compelled to relinquish under the 1874 and 1904 Acts the lands originally granted. If the claims were released, the Railroad would benefit accordingly. It certainly should not be permitted the advantage of both the increased rates and the claims to land.

The statute by its terms makes no distinction based on the origin of the claim, nor does it justify creation of a fourth exception. Nor does the legislative history of the 1940 Act lend support to the qualification that was written into it by the decision below.

The Transportation Act of 1940 originated as S. 2009, 76th Cong., 1st sess., in which form it did not contain any provision for the payment of full rates to land-grant railroads upon the relinquishment of their claims to more land. Such a provision was inserted by the House Committee on Interstate and Foreign Commerce, which in its report (H. Rep. 1217, 76th Cong., 1st sess., p. 28) followed the terms of the bill in describing the release as one covering

> any claim it may have against the United States to lands, interests in lands, compensation, or reimbursement on account of lands

> or interests in lands, which have been granted, claimed to have been granted, or which it is claimed should have been granted to such carrier or any such predecessor in interest under any land grant to such carrier or such predecessor in interest as aforesaid.[18]

In the House debates, the discussion covered only the merits of the proposal, and did not consider how the release should be construed. 84 Cong. Rec. 9715, 9718, 9747, 9864, 9865, 9972–9973, 10113–10119. An amendment to strike Section 321 from the bill was defeated, 84 Cong. Rec. 10113, 10119, and a further amendment which would have required the relinquishment of pending selection lists not yet approved by the Secretary and the reconveyance of unsold lands not used in the operations of the road in return for the rate concession was likewise defeated. 84 Cong. Rec. 10119–10121.

The bill went to a conference committee, which inserted the exception in respect of military or naval property and personnel. The conference report repeats the scope of the release in the pre-

[18] Separate bills designed to accomplish the same result as the amendment had been pending before the same and earlier Congresses. See, e. g., S. 1915, S. 1990, and H. R. 2531, 76th Cong., and S. 3876 and H. R. 10620, 75th Cong., and see *Government Rates on Railroads*, Hearings before the Senate Committee on Interstate Commerce on S. 1915 and S. 1990, 76th Cong., 1st sess., particularly at pp. 64–66, and 164–165.

cise language of the Act. H. Rep. 2832, 76th Cong., 3d sess., p. 93 (86 Cong. Rec. 10174).[14]

Nothing in the debates lends any substance to the suggestion of the court below that a further exception should be read into the Act to cover claims for compensation in kind in respect of lands once vested and thereafter reconveyed to the United States. Congress understood that it was writing finis to a long chapter in the Nation's history, and that conditions had entirely changed from the days when truly imperial grants had been deemed necessary to induce entrepreneurs

[14] The text insofar as here material is as follows:

LAND GRANT RATES

Section 321 of part II of title III of the House amendment provided that the full applicable commercial rates, fares, or charges should be paid to any common carrier subject to the Interstate Commerce Act for transportation of persons or property for the United States, or on its behalf, but this provision was conditioned on the release by the carrier of claims against the United States to lands, interests in lands, compensation or reimbursements on account of lands, or interests in lands which had been granted, claimed to have been granted, or which it was claimed should have been granted to such carrier, under any grant from the United States.

The conference substitute changes this provision by making an exception from this requirement of the payment of full commercial rates by the United States, in the case of the transportation of military or naval property moving for military or naval use, and in the case of the transportation of members of the military or naval forces of the United States (or of property of such members) when such members are traveling on official duty. In the case of transportation thus excepted, existing legal requirements and arrangements providing for reduced rates will continue to apply.

to build the lines of steel without which the West could not have been opened to settlement. Now it was time to close the books, to balance the accounts, to end the further disposal of public lands in aid of construction to which the United States was obligated. And it was up to the railroads to choose whether they would give up such vested rights to land or to claims to land as they may have held (other than approved selection lists, land sold to *bona fide* purchasers, and patented land) in return for the right to exact higher rates from the United States. Nowhere in the debates, nowhere in the Act, and nowhere in the release executed pursuant to the Act is there the slightest vestige of even a glimmering of a suggestion that claims for lieu lands under the Acts of 1874 and 1904 or under similar legislation were to be excepted from the final settlement, so that, as held under the ruling below, the Railroad was to get not only the higher rate but the right to receive more land as well.

II. Apart From the Merits, the Secretary's Construction of the Interrelationship Between the Acts of 1866, 1874, 1904, and 1940 Involved the Exercise of Discretion, Was Reasonable, Has Not Been Shown To Be Clearly Wrong, and Thus Is Impregnable to Mandamus

Up to now we have discussed only the substantive issues between the parties. Again following the precedent of *Santa Fe Pac. R. R.* v. *Work*, 267 U. S. 511, 517—"The case against the construction of the Act of 1874 urged by the Rail-

road Company is so clear that we prefer to put our decision directly on the merits of that issue"—the Court here can determine that the claims now in controversy are so plainly comprehended within the terms of the Railroad's release that decision of further matters is not required. But regardless of the correctness of the Secretary's view, regardless of whether he was right or wrong in rejecting the claims here involved, our present point is that his decision was a reasonable one, that it has not been shown to be clearly wrong, that making it involved the exercise of discretion, and that in consequence, it is, under a long line of cases in this Court which the court below wholly ignored, impregnable to mandamus.

A. IT HAS LONG BEEN SETTLED THAT DECISIONS BY THE SECRETARY OF THE INTERIOR IN MATTERS CONFIDED BY CONGRESS TO HIS DETERMINATION ARE, WHEN REASONABLE AND NOT PLAINLY WRONG, PROOF AGAINST MANDAMUS

We do not question that decisions of the Secretary of the Interior relating to the disposition of the public lands—a matter confided to his determination by Congress—are subject to judicial review. They are always subject to review. We simply say that such decisions, where they involve an exercise of discretion and insofar as they are not unreasonable or plainly wrong, will not be reversed or set aside by "injunction and relief

in the nature of mandamus" (R. 1, 19).[15] This rule is sustained by a long and unbroken line of authorities. *Litchfield* v. *Register and Receiver*, 9 Wall. 575; *Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316; *West* v. *Hitchcock*, 205 U. S. 80; *Ness* v. *Fisher*, 223 U. S. 683; *Alaska Smokeless Coal Co.* v. *Lane*, 250 U. S. 549; *Hall* v. *Payne*, 254 U. S. 343; *Work* v. *Rives*, 267 U. S. 175; *Wilbur* v. *United States*, 281 U. S. 206; *United States* v. *Wilbur*, 283 U. S. 414.

The function of the writ of mandamus was summarized in *Wilbur* v. *United States*, 281 U. S. 206. There Mr. Justice Van Devanter, speaking with his usual precision, said (pp. 218–219):

> Mandamus is employed to compel the performance, when refused, of a ministerial duty, this being its chief use. It also is employed to compel action, when refused, in matters involving judgment and discretion, but not to direct the exercise of judgment or discretion in a particular way nor to direct the retraction or reversal of action already taken in the exercise of either.
>
> The duties of executive officers, such as the Secretary of the Interior, usually are connected with the administration of statutes which must be read and in a sense

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[15] The mandatory injunction here sought is in substance and effect the precise equivalent of a writ of mandamus, and its issuance is governed by identical considerations: *Gaines* v. *Thompson*, 7 Wall. 347, 352; *Miguel* v. *McCarl*, 291 U. S. 442, 452; cf. *Warner Valley Stock Co.* v. *Smith*, 165 U. S. 28, 33.

> construed to ascertain what is required. But it does not follow that these administrative duties all involve judgment or discretion of the character intended by the rule just stated. Where the duty in a particular situation is so plainly prescribed as to be free from doubt and equivalent to a positive command it is regarded as being so far ministerial that its performance may be compelled by mandamus, unless there be provision or implication to the contrary. But where the duty is not thus plainly prescribed but depends upon a statute or statutes the construction or application of which is not free from doubt, it is regarded as involving the character of judgment or discretion which cannot be controlled by mandamus.

In the present case, the petitioners and their predecessors in the Department of the Interior did not have a plain ministerial duty, equivalent to a positive command, to ignore the release given by the Railroad pursuant to the Transportation Act of 1940; and it is apparent from the very terms of the opinion below that the Secretary's decision was neither unreasonable, untenable, nor plainly wrong. The court below said, "We perceive substantial reasons for endorsing the point of view advanced by the railroad," which was referred to as a "much sounder approach" (R. 40, 42). The court below concluded that "neither policy nor precedent is offended" by its holding,

which "will more clearly define and establish the respective interests involved" (R. 42).

The court below, therefore, has not held that the Secretary's construction was plainly wrong, but has simply expressed its own preference for a different construction of the statutes involved. The court's own analysis is itself proof that relief by way of injunction in the nature of mandamus should not have been granted here, on the authority of the cases cited *supra*, p. 40 — cases which, as we have noted, were not even referred to by the court below.

The rule that mandamus will lie against executive or administrative officers only when their duty in a particular situation is so plainly prescribed as to be free from doubt and equivalent to a positive command applies with equal force to the construction of statutes by the officers administering those statutes, as it does to cases involving determinations by them of questions of fact. *Work* v. *Rives*, 267 U. S. 175, 177–178; *Hall* v. *Payne*, 254 U. S. 343, 347–348; *Ness* v. *Fisher*, 223 U. S. 683, 691–692; *Decatur* v. *Paulding*, 14 Pet. 497, 515. While the rule that decisions on questions of law which are not plainly wrong are proof against mandamus has been applied to numerous agencies,[16] it has special weight

[16] *United States ex rel. Girard Co.* v. *Helvering*, 301 U. S. 540 (Commissioner of Internal Revenue); *United States ex rel. Chicago &c. R. Co.* v. *Interstate Commerce Commission*, 294 U. S. 50, 63 (I. C. C.); *Interstate Commerce Commission*

in cases involving the disposition of public lands by the Secretary of the Interior. See especially *Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316, where the Court said (pp. 324–325):

> That the decision of the questions presented to the Secretary of the Interior was no merely formal or ministerial act is shown beyond the necessity of argument by a perusal of the foregoing statement of the issues presented by this record for the decision of the Secretary. Whether he decided right or wrong, is not the question. Having jurisdiction to decide at all, he had necessarily jurisdiction, and it was his duty to decide as he thought the law was, and the courts have no power whatever under those circumstances to review his determination by mandamus or injunction. The court has no general supervisory power over the officers of the Land Department, by which to control their decisions upon questions within their jurisdiction. If this writ were granted we would require the Secretary of the Interior to repudiate and disaffirm a decision which he regarded it his duty to make in the exercise of that judgment which is reposed in him by law, and we should require him to come to a determination upon the issues involved directly opposite to that

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v. *United States*, 289 U. S. 385, 394 (same); *Interstate Commerce Commission* v. *New York, N. H. & H. R. Co.*, 287 U. S. 178, 203–204 (same).

> which he had reached, and which the law conferred upon him the jurisdiction to make.

In *Hall* v. *Payne*, 254 U. S. 343, the question was whether the relator's application for a homestead entry should be given priority, and that in turn depended upon the construction given a certain statute by the Secretary of the Interior. The Secretary's construction resulted in priority being given to one applicant, and the relator sought mandamus to require the Secretary to approve another application. In denying the writ, the Court said (pp. 347–348):

> * * * From the act, and the Secretary's decision, it is apparent that the latter was not arbitrary or capricious, but rested on a possible construction of the act, and one that the reported decisions of the Land Department show is being applied in other cases. * * * He [the Secretary] could not administer or apply the act without construing it, and its construction involved the exercise of judgment and discretion. The view for which the relator contends was not so obviously and certainly right as to make it plainly the duty of the Secretary to give effect to it. * * *

Similarly, in *Wilbur* v. *United States*, 281 U. S. 206, the Secretary of the Interior, on the advice of his Solicitor, had ruled that relators were entitled to share in interest annuities from certain

Indian tribal funds. Eight years later a succeeding Secretary of the Interior, adopting and applying an opinion given by a succeeding Solicitor, put a different construction on the pertinent statute and ruled that the relators were not entitled to share in the interest annuities. The relators sought a writ of mandamus to compel the Secretary to set aside the second ruling and to give effect to the first, urging as one of their grounds that the second ruling was erroneous. Mandamus was denied, the Court saying (pp. 221–222):

> The questions mooted before the Secretary and decided by him were whether the fund is a tribal fund, whether the tribe is still existing and whether the distribution of the annuities is to be confined to members of the tribe, with exceptions not including the relators. These are all *questions of law* the solution of which requires a construction of the act of 1889 and other related acts. A reading of these acts shows that they fall short of plainly requiring that any of the questions be answered in the negative and that in some aspects they give color to the affirmative answers of the Secretary. That the construction of the acts insofar as they have a bearing on the first and third questions is sufficiently uncertain to involve the exercise of judgment and discretion is rather plain. * * *
>
> * * * * * *

> From what has been said it follows that the case is not one in which mandamus will lie. [Italics added.]

There is no need to extend the discussion. While of course there are cases where mandamus has issued, instances where the Secretary had ignored the plain command of a statute or departed from a plain official duty (e. g., *Payne* v. *Central Pac. R. Co.*, 255 U. S. 228; *Santa Fe Pac. R. R. Co.* v. *Fall*, 259 U. S. 197; *Wilbur* v. *Krushnic*, 280 U. S. 306), or where the issues between the parties had been authoritatively determined and his only duty was the ministerial one of making payment pursuant to the award (e. g., *Ickes* v. *Ledbetter*, 77 U. S. App. D. C. 358, 135 F. 2d 658), here the court below did not purport to decide that this was a case falling within those categories.

We have discussed at some length the nature of the issues before the Secretary, and the interrelationships between the statutes he was required to construe. *Supra*, pp. 16–38. The court below did not hold that the Secretary's duty in the premises was purely ministerial, or that he departed from a plain official duty; to the contrary, as we have already pointed out, it simply expressed its own preference for one construction of the statutes involved. It has treated the case as though the matter were before it on appeal from the Secretary; the effect of its holding, therefore, is to compel the Secretary to exercise his judgment and

discretion in a particular way. This cannot be done under the authorities cited and discussed above, pp. 40–46. The writ of mandamus may not "be used as a writ of error." *Work* v. *Rives*, 267 U. S. 175, 183. "Where there is discretion, * * * even though its conclusion be disputable, it is impregnable to mandamus." *Alaska Smokeless Coal Co.* v. *Lane*, 250 U. S. 549, 555.

B. THE FOREGOING RULE IS NOT CHANGED BY ANYTHING IN THE ADMINISTRATIVE PROCEDURE ACT, IF INDEED ITS PROVISIONS ARE APPLICABLE TO THE PRESENT PROCEEDINGS

The writs of certiorari in the present cases were granted on June 10, 1946 (R. 47). On the following day the President approved the Administrative Procedure Act (Public No. 404, 79th Cong., 2d sess.), which in Section 12 provides among other things that

> This Act shall take effect three months after its approval except that sections 7 and 8 [Hearings, Decisions] shall take effect six months after such approval, the requirement of the selection of examiners pursuant to section 11 shall not become effective until one year after such approval, and no procedural requirement shall be mandatory as to any agency proceeding initiated prior to the effective date of such requirement.

The only section which could conceivably apply here would be Section 10—Judicial Review—which became effective September 11, 1946. For

the reasons pointed out below, pp. 49–54, we do not believe that this section was intended to change the scope of review applicable to a case such as the present one, nor to abrogate or limit the rule just discussed. But, in any event, and regardless of the scope of Section 10, we believe that its provisions are not and were not intended to apply to pending proceedings.

Neither in the Act nor its legislative history is there any reference to judicial proceedings seeking review of administrative action which had already been commenced. There is, throughout the legislative history, evidence of intent to afford the various agencies ample time to prepare and make such adjustments in their procedure as the provisions of the Act may require, H. Rep. 1980, 79th Cong., 2d sess., p. 47; S. Rep. 752, 79th Cong., 1st sess., p. 30, and this intent is underscored by the portions of Section 12 quoted above.

It would be anomalous to suppose that Congress intended to make a procedural requirement of the Act inapplicable to an administrative proceeding initiated before the effective date of the requirement but applicable to a judicial proceeding concluded in the lower courts before the effective date of the requirement.[17]

It is not necessary in this case to determine

[17] The general principle that statutes are not to be construed retrospectively, see *United States* v. *Heth*, 3 Cranch 399, 413, is applicable also to statutes governing procedure. E. g., *United States* v. *St. Louis, etc., Ry. Co.*, 270 U. S. 1, 3.

the precise point at which Section 10 would apply. It is sufficient to note that to have that section apply, as here, at some appellate stage of a pending proceeding, would not make for certainty or stability of administrative action, and would be productive only of confusion. While undoubtedly Congress had the power to change the scope of judicial review so as to affect pending proceedings, even at the ultimate appellate stage, the consequences of such a change would be so unsettling that clear and unmistakable evidence of an intention to effect that result should be required. Here there is no such evidence. Accordingly, it seems clear that the provisions of Section 10, which went into effect on September 11, 1946, were, at the very least, not intended to affect the scope of judicial review in proceedings in which certiorari had been granted well before that date.

In any event, the terms and legislative history of the Administrative Procedure Act make it abundantly clear that Section 10 was designed, in general, to restate existing law, and that there was no disposition on the part of the Act's sponsors to change the well settled rule, *supra*, pp. 39-47, that decisions of the Secretary involving the exercise of judgment and discretion, which are not shown to be plainly wrong, will not be set aside by the courts by process in the nature of mandamus.

The general legislative history of the Administrative Procedure Act is set out in S. Doc. 248, 79th Cong., 2d sess., and will not be repeated here. See also 14 U. S. Law Week 2709–2728. We set out below only so much of the background of Section 10 as is applicable here.

Section 10 (b), providing for the form of review, expressly includes "declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus." Section 10 (c) relates to agency action which is reviewable; the changes made by the House Judiciary Committee seem to have been largely in the nature of clarifying amendments. See H. Rep. 1980, 79th Cong., 2d sess., p. 55, n. 21; cf. S. Rep. 752, 79th Cong., 1st sess., p. 27. Section 10 (e) was amended by the House Committee to add "an abuse of discretion" to subsection (B) (1), so as to make it clear that the bill preserved judicial review of abuses of discretion. H. Rep. 1980, *supra*, at p. 55, n. 22.

In the debates, the intent with respect to the scope of judicial review is perhaps most accurately reflected by the following colloquy (92 Cong. Rec. 2195):

> Mr. DONNELL. I should like to ask the distinguished Senator a question. Section 10 of the bill recites in part that—
>
> "Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

"(a) Right of review: Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof."

It has occurred to me the contention might be made by someone in undertaking to analyze this measure that in any case in which discretion is committed to an agency, there can be no judicial review of action taken by the agency. The point to which I request the Senator to direct his attention is this: In a case in which a person interested asserts that, although the agency does have a discretion vested in it by law, nevertheless there has been abuse of that discretion, is there any intention on the part of the framers of this bill to preclude a person who claims abuse of discretion from the right to have judicial review of the action so taken by the agency?

Mr. McCarran. Mr. President, let me say, in answer to the able Senator, that the thought uppermost in presenting this bill is that where an agency without authority or by caprice makes a decision, then it is subject to review.

But in answer to the first part of the Senator's question—namely, where a review is precluded by law—we do not interfere with the statute, anywhere in this bill. Substantive law, law enacted by

statute by the Congress of the United States, granting a review or denying a review is not interfered with by this bill. We were not setting ourselves up to abrogate acts of Congress.

Mr. DONNELL. But the mere fact that a statute may vest discretion in an agency is not intended, by this bill, to preclude a party in interest from having a review in the event he claims there has been an abuse of that discretion. Is that correct?

Mr. MCCARRAN. It must not be an arbitrary discretion. It must be a judicial discretion; it must be a discretion based on sound reasoning.

And see 92 Cong Rec. 2200.

Generally, most contemporaneous comments stress that the bill did not change existing law as to the scope of judicial review. The original draft of Section 10, prepared by the American Bar Association's Committee on Administrative Law, carried the comment that it did not attempt to expand the scope of judicial review. 30 A. B. A. J. 46.[18] The Attorney General advised the Senate Judiciary Committee that Section 10, "in general, declares the existing law concerning judicial review" (S. Rep. 752, 79th Cong., 1st sess., p. 43), a view to which he consistently adhered. See his memorandum (92 Cong. Rec. A3154), which states:

[18] And see Hearings before the House Committee on the Judiciary on H. R. 1203, 79th Cong., 1st sess., p. 38.

> Section 10 as to judicial review does not, in my view, make any real changes in existing law. This section in general declares the existing law concerning judicial review. It is an attempt to restate in exact statutory language the doctrine of judicial review as expounded in various statutes and as interpreted by the Supreme Court. I know that some agencies are quite concerned about the phraseology used in section 10 for fear that it will change the existing doctrine of judicial review which has been settled for the particular agency concerned. I feel sure that should this section be given the interpretation which is intended, namely, that it is merely a restatement of existing law, there should be no difficulty for any agency. We may in a sense look at section 10 as an attempt by Congress to place into statutory language existing methods of review.

In view of this legislative history, and in view of the circumstance that nothing in the language of Section 10 indicates any intention to interfere with the exercise of a discretionary power vested in any agency, in so far as such exercise does not involve an abuse of discretion, we think it plain that Congress did not intend to disturb the settled rule discussed at length above, pp. 39–47, which renders the discretionary decisions of the Secretary of the Interior immune from mandamus where such decisions are neither unreasonable nor

plainly wrong, and where no abuse of discretion is involved. From *Litchfield* v. *Register and Receiver,* 9 Wall. 575, at the December Term, 1869, through *United States* v. *Wilbur,* 283 U. S. 414, decided in October Term, 1930, that rule has never been questioned or qualified. Certainly if Congress intended to alter a principle so firmly and explicitly established, apt language to do so could easily have been fashioned and would certainly have been used. The circumstance that the rule as to the scope of relief in the nature of mandamus was not referred to seems to us proof positive, in the face of the language and legislative history of Section 10 of the Administrative Procedure Act, that no change therein was intended to be made. Consequently, without at this time examining whether, in other respects, the Act may have contemplated some slight alterations in the scope of judicial review in other connections, we assert with confidence that, as to the rule discussed in the present brief, no change whatever was either effected or intended to be effected.

CONCLUSION

The judgments below should be reversed, with directions to reinstate the judgments of the district court.

Respectfully submitted.

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OCTOBER 1946.

APPENDIX

The relevant parts of the Act of July 27, 1866, c. 278, 14 Stat. 292, are as follows:

An Act granting lands to aid in the Construction of a Railroad and Telegraph Line from the States of Missouri and Arkansas to the Pacific Coast.

* * * * * *

SEC. 3. *And be it further enacted*, That there be, and hereby is, granted to the Atlantic and Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific Coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway and its branches, every alternate section of public land, not mineral, designated by odd numbers to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever, on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is designated by a plat thereof, filed in the office of the commissioner of the general land office; and, whenever, prior to said time, any of said sections or parts

of sections shall have been granted, sold, reserved, occupied by said homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections, and not including the reserved numbers: *Provided*, That if said route shall be found upon the line of any other railroad route, to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act: *Provided further*, That the railroad company receiving the previous grant of land may assign their interest to said "Atlantic and Pacific Railroad Company," or may consolidate, confederate, and associate with said company upon the terms named in the first and seventeenth sections of this act: *Provided further*, That all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands in odd-numbered sections nearest to the line of said road, and within twenty miles thereof, may be selected as above provided: *And provided further*, That the word "mineral," when it occurs in this act, shall not be held to include iron or coal: *And provided further*, That no money shall be drawn from the treasury of the United States to aid in the construction of the said "Atlantic and Pacific Railroad."

The Act of June 22, 1874, c. 400, 18 Stat. 194, 43 U. S. C. 888, is as follows:

"*An act for the relief of settlers on railroad lands.*

* * * That in the adjustment of all railroad land grants, whether made directly to any railroad company or to any State for railroad purposes, if any of the lands granted be found in the possession of an actual settler whose entry or filing has been allowed under the pre-emption or homestead laws of the United States subsequent to the time at which, by the decision of the land-office, the right of said road was declared to have attached to such lands, the grantees, upon a proper relinquishment of the lands so entered or filed for, shall be entitled to select an equal quantity of other lands in lieu thereof from any of the public lands not mineral and within the limits of the grant not otherwise appropriated at the date of selection, to which they shall receive title the same as though originally granted. And any such entries or filings thus relieved from conflict may be perfected into complete title as if such lands had not been granted: *Provided,* That nothing herein contained shall be in any manner be so construed as to enlarge or extend any grant to any such railroad or to extend to lands reserved in any land grant made for railroad purposes: *And provided further,* That this act shall not be construed so as in any manner to confirm or legalize any decision or ruling of the Interior Department under which lands have been certified to any railroad company when such lands have been entered by a pre-emption or homestead settler after the location of the line of the road

and prior to the notice to the local land-office of the withdrawal of such lands from market.

The Act of April 28, 1904, c. 1810, 33 Stat. 556, provides in part as follows:

> *An Act for the relief of small-holding settlers within the limits of the grant of land to the Atlantic and Pacific Railroad Company in the Territory of New Mexico.*
>
> * * * That the Atlantic and Pacific Railroad Company, its successors in interest and its or their assigns, may, when requested by the Secretary of the Interior so to do, relinquish or deed, as may be proper, to the United States any section or sections of its or their lands in the Territory of New Mexico the title to which was derived by said railroad company through the Act of Congress of July twenty-seventh, eighteen hundred and sixty-six, in aid of the construction of said railroad, any portion of which section is and has been occupied by any settler or settlers as a home or homestead by themselves or their predecessors in interest for a period of not less than twenty-five years next before the passage of this Act, and shall then be entitled to select in lieu thereof, and to have patented other sections of vacant public land of equal quality in said Territory, as may be agreed upon with the Secretary of the Interior.

Section 321 of the Transportation Act of 1940, Act of September 18, 1940, c. 722, 54 Stat. 954, 49 U. S. C. 65, is as follows:

> SEC. 321. (a) Notwithstanding any other provision of law, but subject to the pro-

visions of sections 1(7) and 22 of the Interstate Commerce Act, as amended, the full applicable commercial rates, fares, or charges shall be paid for the transportation by any common carrier subject to such Act of any persons or property for the United States, or on its behalf, except that the foregoing provision shall not apply to the transportation of military or naval property of the United States moving for military or naval and not for civil use or to the transportation of members of the military or naval forces of the United States (or of property of such members) when such members are traveling on official duty; and the rate determined by the Interstate Commerce Commission as reasonable therefor shall be paid for the transportation by railroad of the United States mail: *Provided, however,* That any carrier by railroad and the United States may enter into contracts for the transportation of the United States mail for less than such rate: *Provided further,* That section 3709, Revised Statutes, (U. S. C., 1934 edition, title 41, sec. 5), shall not hereafter be construed as requiring advertising for bids in connection with the procurement of transportation services when the services required can be procured from any common carrier lawfully operating in the territory where such services are to be performed.

(b) If any carrier by railroad furnishing such transportation, or any predecessor in interest, shall have received a grant of lands from the United States to aid in the construction of any part of the railroad operated by it, the provisions of law with respect to compensation for such transportation shall continue to apply to such trans-

portation as though subsection (a) of this section had not been enacted until such carrier shall file with the Secretary of the Interior, in the form and manner prescribed by him, a release of any claim it may have against the United States to lands, interest in lands, compensation, or reimbursement on account of lands or interests in lands which have been granted, claimed to have been granted, or which it is claimed should have been granted to such carrier or any such predecessor in interest under any grant to such carrier or such predecessor in interest as aforesaid. Such release must be filed within one year from the date of the enactment of this Act. Nothing in this section shall be construed as requiring any such carrier to reconvey to the United States lands which have been heretofore patented or certified to it, or to prevent the issuance of patents confirming the title to such lands as the Secretary of the Interior shall find to have been heretofore sold by any such carrier to an innocent purchaser for value or as preventing the issuance of patents to lands listed or selected by such carrier, which listing or selection has heretofore been fully and finally approved by the Secretary of the Interior to the extent that the issuance of such patents may be authorized by law.

The Administrative Procedure Act, Public No. 404, 79th Cong., 2d sess., provides in pertinent part as follows:

JUDICIAL REVIEW

SEC. 10. Except so far as (1) statutes preclude judicial review or (2) agency

action is by law committed to agency discretion—

(a) RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) FORM AND VENUE OF ACTION.—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute, or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments of writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judical enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

(c) REVIEWABLE ACTS.—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action mean-

while shall be inoperative) for an appeal to superior agency authority.

(d) INTERIM RELIEF.—Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

(e) SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the

facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudical error.

* * * * *

CONSTRUCTION AND EFFECT

SEC. 12. Nothing in this Act shall be held to diminish the constitutional rights of any person or to limit or repeal additional requirements imposed by statute or otherwise recognized by law. Except as otherwise required by law, all requirements or privileges relating to evidence or procedure shall apply equally to agencies and persons. If any provision of this Act or the application thereof is held invalid, the remainder of this Act or other applications of such provision shall not be affected. Every agency is granted all authority necessary to comply with the requirements of this Act through the issuance of rules or otherwise. No subsequent legislation shall be held to supersede or modify the provisions of this Act except to the extent that such legislation shall do so expressly. This Act shall take effect three months after its approval except that sections 7 and 8 shall take effect six months after such approval, the requirement of the selection of examiners pursuant to section 11 shall not become effective until one year after such approval, and no procedural requirement shall be mandatory as to any agency proceeding initiated prior to the effective date of such requirement.

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